(2)

No. 09-168

Supreme Court, U.S.
FILED
OCT 8 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MILVERTHA PINNICK, Guardian and next friend of MANNA PINNICK and CORTLAND PINNICK, minors, and JAMES BRADY, Administrator of the Estate of MELISSA PINNICK, Deceased,

Petitioners,

v.

CORBOY & DEMETRIO P.C., a Professional Corporation, ROBERT J. BINGLE, Individually and as an agent of Corboy & Demetrio P.C., and G. GRANT DIXON, III, Individually and as an agent of Corboy & Demetrio P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF IN OPPOSITION

MICHAEL T. REAGAN
HERBOLSHEIMER LANNON HENSON DUNCAN & REAGAN PC
633 LaSalle Street
Suite 409
Ottawa, IL 61350
(815) 434-1400

C. BARRY MONTGOMERY
Counsel of Record
ALYSSA M. REITER
MICHAEL C. BRUCK
WILLIAMS MONTGOMERY & JOHN, LTD.
Willis Tower
233 South Wacker Drive
Suite 6100
Chicago, IL 60606
(312) 443-3200

Attorneys for Respondents

225648

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. This Court has previously, in Docket No. 08-1129, considered and denied a Petition for Writ of Certiorari involving the identical challenge, to the identical ruling of the Illinois Supreme Court, filed by the identical parties, in the identical case, as in this petition. Under such circumstances, are petitioners barred from filing an identical second Petition for Writ of Certiorari?

2. This petition involves the denial of a motion to recuse four (of seven) State Supreme Court justices from considering a petition for leave to appeal from an adverse appellate court decision. The motion lacked factual support, failed to demonstrate any actual bias, and its claim of an appearance of bias was based upon non-extraordinary contributions made by certain partners at the respondent law firm to those justices' campaign committees many years before the case was presented to that Court. The denial comported with controlling law. Under those circumstances, is there no due process violation in the denial of the motion to recuse and no basis to exercise discretionary review?

RULE 29.6 STATEMENT

Corboy & Demetrio P.C. is a private, Illinois professional corporation. All other respondents are individuals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION OF THE COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI	2
STATEMENT OF THE CASE AND MISSTATEMENT OF FACT OR LAW IN PETITION	2
ARGUMENT AND REASONS FOR DENYING THE SECOND PETITION	10
1. The Petition Should Be Denied as an Improper, Successive Attempt to Seek Review of the Same Ruling on Which Certiorari Was Denied in Docket No. 08-1129	10
2. On its Merits, this Second Petition Should be Denied	14

Contents

Page

A. The Order on Review Properly Denied a Motion Which Was Procedurally Flawed and Substantively Inadequate; Thus, There is No Compelling Reason to Consider Discretionary Review of That Order 15

B. The Petition Fails to Illustrate a Conflict in the Law or Any Compelling Reason to Take this Case 19

C. There is No Reason to Reconsider the Issues Just Decided in *Caperton*, Particularly Where No Constitutional Impropriety Has Been Shown 25

D. This Court Should Not Grant Certiorari To Consider a Moot and Hypothetical Argument 25

E. There Is No Need For Exercise of this Court's Discretionary Review .. 26

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986) 21

Antone v. Dugger,
465 U.S. 200 (1984) 13

Bobby v. Bies,
___ U.S. ___, 129 S.Ct. 2145 (2009) 13

Caperton v. A.T. Massey Coal Co., Inc.,
556 U.S. ___, 129 S. Ct. 2252 (2009) ..... *passim*

Christianson v. Colt Industries Operating Corp.,
486 U.S. 800 (1988) 12

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 21

San Reno Hotel, L.P.
v. City and County of San Francisco, Cal.,
545 U.S. 323 (2005) 13

Volkswagenwerk A.G. v. Falzon,
461 U.S. 1303 (1983) 10

Cited Authorities

Page

Federal Constitution, Statutes and Rules

United States Supreme Court Rule 10 14

United States Supreme Court Rule 15.2 2

State Constitution, Statutes, Codes and Rules

Ill. Const. of 1848, Art. V, § 3 8

Ill. Const. of 1970, Art. VI, § 4 3

Illinois Supreme Court Rule 63 ..... 15, 17, 18

Illinois Supreme Court Rule 67 6

Illinois Supreme Court Rule 315 3

Illinois Supreme Court Rule 328 16

Illinois Supreme Court Rule 361 16

Miscellaneous

Amicus curiae brief of Conference of Chief Justices, *Caperton v. A.T. Massey Coal Co., Inc.*, 2009 WL 45973 (U.S.) 8

Respondents respectfully submit this brief in opposition to Petitioners' Petition for a Writ of Certiorari. Petitioners (plaintiffs below) lost an appeal from a legal malpractice case against these respondents-defendants. Plaintiffs sought the Illinois Supreme Court's discretionary review by filing a petition for leave to appeal from the Appellate Court's unpublished order. Concurrently with that petition, they filed a motion to recuse four of the seven sitting Supreme Court Justices. Citing to contributions made by certain partners of the respondent law firm of $250 to, at most, $11,500 (and the vast majority ranging from $250 to $2,500) to those judges' campaign committees years (some nearly a decade) before the petition was filed, plaintiffs contended that the appearance of bias required recusal. The motion to recuse was denied and a Petition for Writ of Certiorari followed in Docket No. 08-1129 ("the First Petition"). On June 29, 2009, this Court denied certiorari in Docket No. 08-1129. Petitioners now file this petition ("the Second Petition"), purportedly from the Illinois Supreme Court order denying leave to appeal. This Second Petition raises nothing more than the identical issues that were raised in the First Petition and should likewise be denied.

OPINIONS BELOW

Petitioners are not directly challenging the merits of the underlying judgment, the Illinois Appellate Court decision, or even the Illinois Supreme Court's order denying leave to appeal in this Second Petition. Instead, they are challenging the Illinois Supreme Court's December 22, 2008 order denying recusal of four justices. That was the order/opinion below on which the

Petition for Writ of Certiorari in Docket No. 08-1129 was based. On March 25, 2009, the Illinois Supreme Court issued an order denying leave to appeal from the Appellate Court decision. Petitioners have stated that they are measuring the 90-day time (to file this Petition) from that March 25, 2009 order. No challenge is actually made, however, to the merits of the March 25, 2009 order denying leave to appeal. The only legal issue raised here is whether due process demanded recusal of certain judges, which relates to only the December 22, 2008 order denying recusal.

JURISDICTION OF THE COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Respondents contend that this Second Petition is improper as a successive, barred Petition.

STATEMENT OF THE CASE AND MISSTATEMENT OF FACT OR LAW IN PETITION

Much of the factual recitation in the Petition is devoted to "facts" regarding the merits of the legal malpractice suit against respondents. While respondents take issue with many of these "facts," the merits of the underlying case are not at issue now. The only legal issue at stake pertains to the denial of recusal of four Justices of the Illinois Supreme Court based upon campaign contributions or other claims of bias. Accordingly, because many of the misstatements do not "bear[] on what issues properly would be before the Court if certiorari were granted" (Supreme Court Rule 15.2), respondents have not undertaken to correct every specific misstatement of fact or law.

Background Information

In 2003, Plaintiffs filed suit against these defendants arising out of the defendants' representation of the plaintiffs in an underlying automobile negligence action against James Dinsmore. Plaintiffs obtained a judgment on one of five counts in the Complaint. Although plaintiffs secured a judgment, they appealed from adverse rulings, including dismissal of other counts of the complaint and a ruling limiting their recovery to $100,000.

On June 30, 2008, the Illinois Appellate Court issued a "Rule 23 order" (an unpublished, non-precedential decision), which affirmed the trial court judgment. Plaintiffs sought rehearing of that decision or, alternatively, a certificate of importance allowing them to appeal to the Illinois Supreme Court. The Appellate Court denied plaintiffs' requested relief but issued a modified decision on October 20, 2008. (App. 15-48).[1]

Plaintiffs filed a petition for leave to appeal to the Illinois Supreme Court on November 24, 2008. The Illinois Supreme Court has jurisdiction to allow discretionary appeals to its court in cases like this. *See* Ill. Const. of 1970, Art. 6, § 4; Ill. Supreme Court Rule 315. The petition is submitted to the court, which must decide by a quorum (four justices) to grant leave to appeal. If review is granted, then the case is briefed and the court decides the case on the merits. Leave to

---

1. This refers to the Appendix attached to Petitioners' Petition for Writ of Certiorari in this Docket.

appeal is granted in a very small percentage of the civil appeals for which leave to appeal is sought.[2]

When plaintiffs filed their petition for leave to appeal, they also filed a motion to recuse four of the seven presiding Supreme Court Justices from considering the petition. (App. 3-13). The motion attached a six-paragraph affidavit of plaintiffs' counsel but no other documents or evidence. The motion asserted that these four justices should be recused because of contributions made to each of these justices' campaign committees by Corboy & Demetrio partners Robert Bingle, Philip Corboy, Philip Corboy, Jr., Michael Demetrio and Thomas Demetrio.[3] The motion further asserted that there was a close relationship between Phillip Corboy and several Justices due to Mr. Corboy's role as special counsel to the Illinois Democratic Party.[4]

The motion also gratuitously asserted that bias might be based on certain contributions by attorneys Joseph Power and Robert Clifford. Power and Clifford are Illinois attorneys who had been deposed as expert

---

2. According to the 2007 Caseload and Statistical Records available on the Illinois Supreme Court website, from 2003 through 2007 a total of 3,189 petitions for leave to appeal and/or appeal as a matter of right were filed and a total of 248 were allowed, which is 7.7%.

3. These are the attorneys that plaintiffs noted they were basing their motion on so we have limited our analysis herein to these attorneys as well.

4. In reality, Corboy's position as counsel ended 15 years ago. He was general counsel to the Illinois Democratic Party from April 1990 to November 1994.

witnesses for the defendants during the malpractice suit below. The motion also asserted that Joseph Power had acted as counsel for Justice Thomas in a recent suit. Neither the Appellate Court decision (which plaintiffs were seeking leave to appeal) nor the petition for leave to appeal mentioned either Mr. Clifford or Mr. Power by name. These experts issued opinions during discovery in the trial court but their opinions did not form the basis of the circuit court's rulings for defendants or the Appellate Court's affirmance. Except for the fact that plaintiffs raised these names within the motion to recuse, the text of the documents submitted would not have alerted the Justices considering the petition for leave to appeal that either Mr. Clifford or Mr. Power had been involved in the case below.

Facts Regarding Contributions

As set forth below, respondents contend that the plaintiffs' motion to recuse was deficient by failing to set forth sufficient or clear facts as to what they were basing their motion on. The affidavit attached to the motion stated that the facts were obtained from the Illinois State Board of Elections ("ISBE") website.[5] The respondents have reviewed the ISBE website and the semiannual and final reports that would have been available on that website through November 2008 (when the motion to recuse was filed). The amounts that we glean match the numbers suggested by plaintiffs and the facts are summarized here. We found 30 contributions (by the partners identified by plaintiffs)

5. The website can be found at http://www.elections.state.il.us or http://www.elections.il.gov.

ranging from $250 to one $10,000 donation and one $11,500 donation. 23 of the 30 contributions ranged from $250 to $2,500. Except for Justice Burke, each of the elections for which contributions were made took place in 2000, long before the 2003 suit was filed or the case worked its way up to the Illinois Supreme Court in 2008. Burke's uncontested election took place in 2008.

Further details regarding the contributions to each of the Justices at issue are listed below. None of these Justices acted as either a campaign chairman or a treasurer for his or her committee. Indeed, Illinois Supreme Court Rule 67 (B)(2) provides that "a (judicial) candidate shall not personally solicit or accept campaign contributions."

Justice Fitzgerald

From a period of January 1, 1999 through December 31, 2000, the Citizens Committee to Elect Thomas R Fitzgerald received contributions of $890,840. Of that amount during that time, the site shows that the relevant Corboy & Demetrio partners contributed a total of $52,750 or about 5.9%. The site shows that petitioners' counsel, Boyle, contributed $650 to Fitzgerald during the same period.

Justice Freeman

In 1990, Freeman was elected to the Illinois Supreme Court. The contributions in 1999 and 2000 were related to his 2000 retention contest. The website reports contributions made from July 1, 1999 to December 31, 2000 to Freeman's campaign committee of a total of

$216,575 but only the semiannual report for July 1, 2000 to December 31, 2000 itemizes contributions. It shows that of the $154,650 in individual contributions during that time frame, a total of $5,000 (or about 3%) came from the partners plaintiffs identified at the defendant firm.

Justice Thomas

Thomas was elected in 2000. From July 1, 1999 to December 31, 2000, Thomas received $566,470 with $16,000 or about 2.8% being contributed by the identified partners of the defendant firm. Plaintiffs' counsel, Boyle, contributed $250 to Thomas during this time.

Justice Burke

Burke was appointed to the Supreme Court in 2006 and ran for election in 2008. From January 1, 2007 to December 31, 2007, she received $1,601,320 from hundreds of contributors. Plaintiffs state that contributions by the defendant firm's partners totaled $1,500. That is less than one percent. Burke's election was uncontested and many of the contributions were ultimately returned to the contributors.

Plaintiffs also gratuitously include information regarding contributions (totaling $24,000) made to Justice Burke's husband. Alderman Edward Burke. As is the case with the vast bulk of the contributions alluded to but not specified by plaintiffs, many of the contributions to Alderman Burke were made before this 2003 suit was filed, let alone before it had a reasonable

prospect of being in the Illinois Supreme Court. Within the time frame which seems to be the subject of plaintiffs' undifferentiated summary, contributions were made as early as 1999.

General Information Regarding Contributions

Except for Justice Burke, the contributions at issue took place in 1999 and 2000. (For Justice Burke, the contributions took place in 2007 but amount to less than 1% of her contributions.) The Pinnick lawsuit was filed in the circuit court in 2003 – three years after most of these contributions were made. It was appealed in 2007 – almost eight years after most of these contributions were made. The petition for leave to appeal was filed in November 2008 – nearly a decade after many of the contributions were made.

Illinois Law Regarding Election of Judges

Like 38 other states which provide for election of some or all judges,[6] in Illinois, State Supreme Court Justices may be elected and individuals may contribute to their political campaigns. Indeed, the Illinois constitution has allowed for public election of judges for over 150 years. *See* Ill. Const. of 1848, art. V, § 3; Ill. Const. of 1870, Art. VI, § 10.

---

6. According to an *amicus curiae* brief filed by the Conference of Chief Justices in *Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22, currently 39 states allow for election of judges. 2009 WL 45973, *11 (U.S.). And, "all but a handful of States hold popular elections to choose at least *some* judges to *some* benches at *some* stage of a judge's career." 2009 WL 45973, *5 (U.S.). The same brief states that, nationwide, 60% of all appellate judges face a contestable election. *Id.* at *6, n.11.

Proceedings in Docket No. 08-1129

On March 3, 2009, in Docket No. 08-1129, plaintiffs filed a Petition for Writ of Certiorari directed at the December 22, 2008 order of the Illinois Supreme Court (App. 1-2) denying plaintiffs' motion for recusal. On March 25, 2009, the Illinois Supreme Court denied leave to appeal the *Pinnick* case. (App. 14). On April 22, 2009, Petitioners filed a supplemental brief in this Court. Upon request of this Court, respondents filed a response to the First Petition on May 28, 2009.

The First Petition challenged the December 22, 2008 denial of Petitioners' motion for recusal of four justices of the Illinois Supreme Court. In their Supplemental Brief, petitioners asserted that "on March 25, 2009, the Illinois Supreme Court – with *none* of its Justices having recused himself or herself from considering this appeal – denied petitioners' Petition for Leave to Appeal, leaving petitioners with no further appellate remedy in the State Courts to have the entry of summary judgment against them reviewed or reversed. . . ." (Supplemental Brief, p.1-2).

On June 8, 2009, this Court issued its opinion in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. ___, 129 S.Ct. 2252 (2009), which addressed due process standards for recusal based upon campaign contributions. On June 9, 2009, the briefs in Docket No. 08-1129 were distributed for conference on June 25, 2009. On June 29, 2009, this Court issued its order denying the First Petition.

ARGUMENT AND REASONS FOR DENYING THE SECOND PETITION

1. The Petition Should Be Denied as an Improper, Successive Attempt to Seek Review of the Same Ruling on Which Certiorari Was Denied in Docket No. 08-1129

In Docket number 08-1129, plaintiffs sought certiorari review of the December 22, 2008 Illinois Supreme Court order denying recusal of four of its justices. This Court denied the First Petition. In this successive Second Petition, plaintiffs seek certiorari review of the very same December 22, 2008 ruling for the same reasons. Numerous principles of federal jurisprudence bar plaintiffs from filing successive petitions seeking the identical relief from the identical ruling when this Court has already considered it and denied relief.

First, when "the question on the merits is unchanged," this Court's previous ruling is the law of the case. *Cf. Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303, 1304 (1983). The petition in Docket no. 08-1129 presented the following two questions:

> 1. Are appellants in the Illinois appellate courts denied due process where one or more appellate judges hearing their appeal receive substantial contributions for their election campaigns directly from – and have close personal ties with – the opposing party, the appellee?

> 2. Do members of the Illinois judiciary who hear an appeal involving a party who makes substantial contributions to their election campaign – and with whom they have close personal ties, – lose, or appear to lose, their ability to decide the appeal fairly and impartially so that recusal is required as a matter of due process?

The questions presented in this Second Petition are virtually verbatim from those in the First Petition. The two questions Petitioners present here are:

> 1. Are petitioners denied due process when one or more Justices of the Illinois Supreme Court hearing their appeal receive substantial contributions for their election campaigns directly from – and have close personal and professional ties with – the respondents, the parties opposing their appeal?
>
> 2. Do members of the Illinois judiciary hearing an appeal involving a party who makes substantial contributions to their election campaign – and with whom they have close personal and professional ties, – lose, or appear to lose, their ability to decide the appeal fairly and impartially so that recusal is required as a matter of due process?

On those questions, which were fully briefed by both parties, this Court denied certiorari review in the First Petition. While law of the case is not an absolute prohibition from revisiting a prior decision, "as a rule

courts should be loathe to do so in the absence of extraordinary circumstances. . . ." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988). Here, no facts or circumstances have changed that would justify deviating from the law-of-the-case principle. This Second Petition is purportedly seeking relief from the March 25, 2009 order of the Illinois Supreme court denying plaintiffs' leave to appeal from the Illinois Appellate Court to the Illinois Supreme Court. The only substantive issue raised, however, is whether the four justices should have recused themselves – the identical issue argued in Docket no. 08-1129. This Court knew that the Illinois Supreme Court had denied leave to appeal while the First Petition was pending because (on April 22, 2009) plaintiffs filed a supplemental brief advising the Court of such. The only legal significance of the denial of leave to appeal was that it rendered the December 22, 2008 order denying recusal a final order from which plaintiffs could seek review.[7]

The only other thing that has changed between the time that plaintiffs filed the First Petition and supplemental brief and the time they filed the Second Petition is that this Court issued its opinion in *Caperton*

---

7. Until leave to appeal was denied, at least arguably, the recusal order was not final and plaintiffs could not have shown any actual harmful error (since, if the Illinois Supreme Court had granted leave to appeal, then their supposed bias in considering the petition for leave to appeal would have been moot). But, once the Illinois Supreme Court denied leave to appeal, defendants did not challenge the finality of the recusal order. Instead, defendants assumed that the plaintiffs had properly filed their First Petition. The defendants thereafter, upon request of this Court, filed a Response to the First Petition.

v. A.T. Massey Coal Co. Inc., 556 U.S. ___, 129 S.Ct. 2252 (June 8, 2009). However, that too is of no legal consequence to the redundancy of this Second Petition. The opinion in *Caperton* was issued on June 8, 2009. On June 25, 2009, this Court held its conference on the First Petition and, on June 29, 2009, issued its order denying the First Petition. Thus, the Court had the benefit of the *Caperton* decision when it denied certiorari review and there is no basis to reconsider the decision to deny review. The law of the case is that further review on this recusal ruling is not warranted.

Concepts of res judicata and issue preclusion also render this Second Petition improper. Under res judicata principles, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *San Reno Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 336, n.16 (2005). Issue preclusion "bars relitigation of determinations necessary to the ultimate outcome of a prior proceeding." *Bobby v. Bies*, ___ U.S. ___, 129 S.Ct. 2145, 2149 (2009). Both of these concepts embody a rule that "has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation." *San Remo Hotel*, 545 U.S. at 336-37 (discussing principles of res judicata and issue preclusion as incorporated in full, faith & credit statute). *See also Antone v. Dugger*, 465 U.S. 200, 206 (1984) (reargument in successive petitions for writ of habeas corpus was "abuse of the writ."). This Court has already ruled on the merits of whether to accept this matter for review and the issue should not be relitigated.

Under any name, the point is the same. This Court has already considered whether to review the recusal order at issue here. It has already denied certiorari. There is no basis for plaintiffs to get a second bite at that apple. Respondents recognize that the grant or denial of a Petition for Writ of Certiorari is a discretionary matter. But where there has been no change in the relevant facts or circumstances, there is no basis for this Court to change its exercise of discretion and it is improper for Petitioners to ask the Court to do so. This Second Petition should be denied outright as an improper, successive petition.

2. On its Merits, this Second Petition Should be Denied.

If this Court nevertheless opts to consider the merits, this Second Petition should be denied for the same reasons that this Court properly denied the First Petition. The petition seeks review of an order denying a procedurally flawed motion, which was properly denied on its face; it presents legal issues that are not unsettled or in conflict with any other decision; and it involves an order that was properly denied on substantive grounds. Pursuant to United States Supreme Court Rule 10, a petition for writ of certiorari "will be granted only for compelling reasons." The character of reasons that this Court considers include whether a state court has decided an important federal question "in a way that conflicts with" another state high court or federal appellate court opinion or whether a state court "has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." *Id.*

This case does not meet any of these criteria. It is not compelling. It presents no reason justifying use of this Court's resources.

A. The Order on Review Properly Denied a Motion Which Was Procedurally Flawed and Substantively Inadequate; Thus, There is No Compelling Reason to Consider Discretionary Review of That Order

Petitioners sought discretionary review in the Illinois Supreme Court of an Illinois Appellate Court order affirming the judgment from which they sought review. On November 24, 2008, petitioners filed a motion for recusal of four of the seven Illinois Supreme Court Justices pursuant to Illinois Supreme Court Rule 63(C) and for appointment of temporary Justices for those who recused themselves. (App. 3). As a review of that motion shows, the motion was inadequate, on its face, because it was comprised of primarily conjecture and surmise with virtually no facts or evidence to support the petitioners' contentions. As to those facts that were included within the motion, it lacked evidentiary or documentary support. Even if the facts recited were considered, they were inadequate on their face to merit the relief sought. Accordingly, the motion had to be and was properly denied and there is no basis to seek review of it.

1. The Motion at Issue Was Procedurally Flawed

Procedurally, Illinois Supreme Court Rule 361 governs "Motions in Reviewing Court." It provides that, where a record has not been filed, a movant must file with the motion an appropriate supporting record pursuant to Rule 328. Petitioners' motion lacked a supporting record or sufficient documentary support. Instead, the motion simply made statements, apparently based upon counsel's personal beliefs, with no support.

Regarding the campaign contributions, petitioners' counsel stated only that he obtained information from the ISBE website and the D-2 campaign disclosures available on the site. Plaintiffs' counsel did not state, however, the specific dates he was using, did not attach the actual D-2 disclosures and did not attach any documentation from the website. We are left to examine the website ourselves and guess at whether we are using the same specific information. For other "facts," there is no support whatsoever.

Neither the court nor the opposing party should be left to rule on or respond to a motion which is utterly lacking in documentation, proof or context. On its face, the motion failed to meet the minimum prerequisites for consideration as a valid motion.

2. The Motion Was Substantively Without Merit

Even assuming the accuracy of the "facts" recited in petitioners' motion, they did not support a finding for recusal. Petitioners filed their motion "[p]ursuant to Supreme Court Rule 63(C)" (App.4a), but they failed to present facts or argument supporting a finding of partiality under that rule. Rule 63(C) is Canon 3, entitled "A Judge Should Perform the Duties of Judicial Office Impartially and Diligently." Section C, governing disqualification, provides in pertinent part as follows:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts . . .;
>
> (b) the judge served as a lawyer in the matter . . . ;
>
> (c) the judge was...associated in the private practice of law with any law firm . . . currently representing any party. . . ;
>
> (d) the judge knows that he or she . . . or the judge's spouse . . . has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any

> other more than de minimus interest that could be substantially affected by the proceeding; or
>
> (e) the judge or the judge's spouse . . . :
>
> (i) is a party to the proceeding;
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have a more than *de minimus* interest that could be substantially affected by the proceeding; or
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Illinois Supreme Court Rule 63.

Thus, Rule 63 governs disqualification where the judge is actually partial or personally biased in some significant way. Petitioners' motion did not present an argument of such actual partiality or bias. The motion did not recite facts falling within any of the categories listed in subsections (a) through (e). Instead, the motion argued the mere "appearance of impartiality . . . ." (App. 8a).

In this Second Petition, plaintiffs argue that recusal, pursuant to *Caperton*, is required "'when the probability of actual bias on the part of the judge or decision-maker

is too high to be constitutionally tolerable' – when, that is, there is a 'serious objective risk of actual bias.'" (Second Petition, p.23, citing *Caperton*, 556 U.S. at ___, 129 S.Ct. at 2257, 2265). Thus, petitioners essentially concede that something more than a mere appearance of impartiality is required to trigger recusal. Plaintiffs' motion, which relied on a mere appearance of impartiality, accordingly, was properly denied because it failed on its merits.

B. The Petition Fails to Illustrate a Conflict in the Law or Any Compelling Reason to Take this Case

Petitioners view *Caperton* as requiring recusal, as a matter of due process, when the party essentially "choose[s] the judge who will rule on his appeal . . . ." (Second Petition, p. 24). The ruling denying recusal in our case does not conflict with that principle. The minimal dollar contributions made here many years before the petition for leave to appeal was filed (and in some instances even before the suit was first filed) could not possibly be characterized as one in which the attorneys were "choosing" their judge.

In this Second Petition, plaintiffs conjure up new, purported facts regarding the judicial elections. They claim that the Firm and the named respondents "provided [the four justices] with the political machinery, the 'slating," and the votes so that these justices were selected to run and then elected to their positions in the first place." (Second Petition, p.25). This contention should be completely ignored by this Court. This outrageous claim was never asserted in the motion for

recusal. Plaintiffs pluck this statement out of thin air and insert it into this Second Petition with no Record citation and without pointing to any evidence to support it. Nothing is cited for a simple reason: there is no such evidence and the statement is just plain wrong.

In the same vein, petitioners make the further outlandish statements that "the Firm and its principal partners are the primary determinants of who will be 'slated' for judgeships county and state-wide, who will receive the most money for their respective election campaigns (depending on whether their elections are contested) and *who will eventually be elevated to the State's judicial appellate tier.*" (Second Petition, p.27) (emphasis in original). These assertions are absurd. These assertions are also, obviously, not supported by any record citation.

This Court should simply ignore the various purported "facts" which were never asserted before and for which there is no Record or evidentiary support.

Petitioners also suggest that this Court should use this case to "answer" the 40 hypothetical questions posed by Chief Justice Roberts in his *Caperton* dissent. However, the dissent was urging that the Court maintain a narrower approach as to when a failure to recuse could be considered a due process violation. In the present case, involving facts that do not come close to the extreme facts in *Caperton*, the *Caperton* dissent does not aid petitioners in their argument.

The order that petitioners are challenging does not conflict with *Caperton* nor with prior recusal decisions.

To the contrary, the case law supports the order on review. This Court recognized in *Republican Party of Minnesota v. White*, 536 U.S. 765, 783 (2002), that "the Due Process Clause of the Fourteenth Amendment [] has coexisted with the election of judges ever since it was adopted." (internal citation omitted). This Court has also recognized that certain "biasing influence[s]" can be "too remote and insubstantial to violate the constitutional constraints." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 (1986) (citations omitted). So, in *Aetna*, this Court rejected the suggestion that other justices on the Alabama Supreme Court should have been recused because they were also potential class members of the class action at issue, finding such "slight pecuniary interest" to be "highly speculative and contingent" and therefore not raising any constitutional concern. *Id.* at 825-26.

In *Caperton*, this Court confirmed several principles applicable here. The Court first restated that "most matters relating to judicial disqualification [do] not rise to a constitutional level." 129 S.Ct. at 2259, *citing FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). The Court identified three instances requiring recusal as a matter of due process: (1) where the judge has a direct, personal, substantial, pecuniary interest in the litigation; (2) where the judge had a sufficient financial interest such that, objectively, it would tempt him to disregard neutrality; and (3) where a reviewing judge had a conflict arising from his participating in an earlier proceeding in the case. *Id.* at 2259-61.

Caperton applied the principles that emerged from those three categories of cases to the framework of

judicial elections. It considered whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 2263, *citing Withrow v. Larkin*, 421 U.S.35, 47 (1975).

Applying that standard to the facts, the Court first held that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." *Id.* at 2263. The Court concluded:

> . . . that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Id. at 2263-64.

The present case does not raise any of the issues which gave rise to a constitutional concern in *Caperton*. The respondents did not have a "significant and disproportionate influence . . . ." As discussed above,

the amounts were relatively small and were minor percentages of the justices' campaign funds. The contributions made to these justices totaled $1,500 to Burke, $16,000 to Thomas, $5,000 to Freeman, and $52,750 to Fitzgerald, comprising less than 1% to, 2.8%, to 3%, to at most, 5.9% (respectively) of the contributions made to these justices' campaign committees years ago. These contributions cannot be characterized as significant nor disproportionate.

The amounts contributed by Joseph Power and Robert Clifford, defendants' legal experts in the underlying suit, should not be considered at all. This appeal involved the dismissal of certain counts of plaintiffs' complaint and summary judgment on other counts. No reference was made to either Power or Clifford in the Appellate Court's 42-page decision or in plaintiffs' 20-page Petition for Leave to Appeal. Their opinions were not the basis of either the trial court's rulings or the Appellate Court's affirmance. Those attorneys' relationships, whatever they are, with the Supreme Court justices is irrelevant in this case. On the face of the documents submitted to the Illinois Supreme Court to decide whether to grant leave to appeal, the court would not have known that either of these gentlemen were involved in this suit. Accordingly, their relationship to any of the judges and their campaign contributions should not even be considered. Also irrelevant and not worthy of consideration is the separate contributions that had been made to the campaign committee of a justice's spouse (Edward Burke).

Next, unlike the tight race in *Caperton*, two of these elections were uncontested. Nor were the funds raised "when the case was pending or imminent." For most of the justices, the contributions took place in 1999 to 2000, nearly a decade before the November 2008 motion to recuse. Even if *past* contributions (as opposed to contemporaneous contributions) could have any potential to bias a judge to rule a certain way, based upon some debt of gratitude or other elusive theory, at some point such "debt" must fade. A contribution made many, many years before the case at issue cannot be deemed to have any effect, or a sufficient effect, to constitute a due process concern. The suit was pending when a mere $1,500 was contributed to Justice Burke. However, her election was uncontested and the funds were contributed before the case worked its way up to the Supreme Court. This Court held in *Caperton* that "[t]he temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical." *Id.* at 2264. That "critical" temporal element is clearly missing in our case.

The Court concluded its analysis in *Caperton* by reminding us that "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Id.* at 2267. It held that "[a]pplication of the constitutional standard implicated in this case will thus be confined to rare instances." *Id.*

The present case is not such a "rare instance" meriting this Court's review, again, of these legal issues. Petitioner's reliance on "a more stringent non-constitutional standard expressed in federal law and various state and federal judicial codes" (Second

Petition, p. 25), is misplaced. The *Caperton* Court acknowledged that states can adopt recusal standards more rigorous than due process requires. 129 S.Ct. at 2267. So, even if any of these justices should have recused himself under some more rigorous standard (which is denied), it does not establish any due process violation or any conflict with *Caperton.*

C. There is No Reason to Reconsider the Issues Just Decided in *Caperton*, Particularly Where No Constitutional Impropriety Has Been Shown

In *Caperton*, the Court had the opportunity to explore the due process boundaries of recusal motions based upon judicial campaign contributions. That opinion is only four months old. There has been no change or development in our nation's politics, judicial campaign history, laws or otherwise in the past four months to justify this Court again reviewing this legal issue. Even if the Court were inclined to reconsider this issue at some point, it should wait until the courts have had a chance to apply *Caperton* before expending its resources on this issue again.

D. This Court Should Not Grant Certiorari To Consider a Moot and Hypothetical Argument

Part of petitioners' argument is hypothetical, further warranting that this Court decline review. In section B, petitioners argue:

> If petitioners' motion for recusal of the four Justices . . . **had been** successful, the Court

> **would have** lacked a quorum . . . to conduct further review . . . and because a clear majority of four votes out of seven is necessary to grant petitioners' Petition for Leave to appeal, **it would have** lacked the power to grant the petitioners' Petition for Leave to Appeal . . . .

(Second Petition, p. 34, emphasis added). But the point is that the motion to recuse was denied. Accordingly, the Illinois Supreme Court "dismiss[ed] as moot" that portion of petitioners' motion. There is no basis for this Court to consider, on certiorari review, the moot and dismissed portion of the motion.

Moreover, the petition indicates that the Illinois Senate has proposed a "Joint Resolution Constitutional Amendment 10 (SJRCA10)" which would amend Article VI, § 3 of the Illinois Constitution to allow for interim appointment of appellate court judges to serve for recused Supreme Court judges. Accordingly, the State is working through its own procedures to address this issue and it is both premature and unnecessary for this Court to expend its limited resources in addressing this.

E. There Is No Need For Exercise of this Court's Discretionary Review

The petition should be denied because it utterly fails to provide this Court with any compelling reason for it to exercise its discretionary and limited review powers to consider this case. There is no conflict between any case law identified. This Court has already considered and decided *Caperton*, which addresses these legal issues. Petitioners have already raised these arguments in their First Petition and this successive Second Petition should not be indulged.

CONCLUSION

Wherefore, based upon the arguments and reasons above, defendants/respondents respectfully request that the Writ which Petitioners seek be summarily denied and all other, alternative relief be denied.

Respectfully submitted,

MICHAEL T. REAGAN
HERBOLSHEIMER LANNON
HENSON DUNCAN
& REAGAN PC
633 LaSalle Street
Suite 409
Ottawa, IL 61350
(815) 434-1400

C. BARRY MONTGOMERY
Counsel of Record
ALYSSA M. REITER
MICHAEL C. BRUCK
WILLIAMS MONTGOMERY
& JOHN, LTD.
Willis Tower
233 South Wacker Drive
Suite 6100
Chicago, IL 60606
(312) 443-3200

Attorneys for Respondents